STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeal's Opinion of July 19, 2002 before: Cooper, P.J., and Griffin, and Saad, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

RICHARD KIMBLE,

Defendant-Appellee.

Supreme Court
No. 122271

Court of Appeals
No. 227212

Lower Court
No. 99-006942

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

AND

PROOF OF SERVICE

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STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF REQUESTED

This is the State's appeal, on leave granted, from the Court of Appeal's published opinion dated July 19, 2002. Defendant-Appellee requests this Court to affirm the portion of the opinion granting resentencing.

STATEMENT OF MATERIAL PROCEEDINGS AND ORDERS BELOW

Defendant-Appellee, Richard Kimble, was convicted of Second Degree Murder, MCL 750.317, MSA 28.549, and Felony Firearm, MCL 750.227b, MSA 28.424(2) after a waiver trial.

On April 13, 2000, the Honorable Diane Hathaway, presiding imposed sentences of thirty (30) to seventy (70) years, plus a consecutive two (2) year term.

On July 19, 2002, the Court of Appeals affirmed the conviction, but remanded for resentencing.

STATEMENT OF JURISDICTION

Defendant-Appellee accepts the Statement of Jurisdiction set forth by Plaintiff-Appellant.

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS ABUSE ITS DISCRETION IN APPLYING THE PLAIN ERROR DOCTRINE BECAUSE IT IS UNDISPUTED THAT THE SENTENCE WAS OUTSIDE THE APPROPRIATE GUIDELINE RANGE DUE TO AN ERRONEOUS SCORING OF THE GUIDELINES BY THE TRIAL COURT, RENDERING THE SENTENCE UNLAWFUL?**

Defendant-Appellee states "NO"
Plaintiff-Appellant states "YES"

COUNTER- STATEMENT OF FACTS

Defendant-Appellee accepts the Plaintiff-Appellant's Statement of Facts, but sets forth the entire discussion between the attorneys and the trial court regarding the scoring of offense sixteen (16):

> MS. LINDSEY: And, lastly, your Honor, OV-16, which talks about the value of the property obtained. In this case, the value of the property obtained was the car, the 1983 Olds four-door, with the gold Dayton rims. The defendants indicated that they wanted the car and the gold rims, and that they were gong to sell them for over a thous– between a thousand dollars and a thousand, two hundred dollars. That would squarely put the property in the category of the property obtained or destroyed had the value of a thousand dollars, or more, but not more than twenty thousand dollars. And I think that he should be assessed five points.
>
> MR. DALY: Judge, the probation department has scored this one point. That's accurate. In this particular case, we're talking about a vehicle that's a 1983 car. We don't know much about it. The prosecution really hasn't offered anything, in terms of its fair market value. But I would concede that with the rims, it's worth more than two hundred dollars but less than a thousand dollars, Judge. And there is nothing to the contrary, so that the one point is accurate, Judge.
>
> THE COURT: Well, I believe the five points is accurate, which would make a difference of four, according to how it's scored. They scored it at one, correct?
>
> MS. LINDSEY: That's correct, your Honor.
>
> THE COURT: All right. So, I mean it is in excess of one thousand dollars, based on the testimony. So, OV-16 should be five points,

which I believe, now, would make a difference of 19 points more. Is that what you both figured. (Appellee's Appendix, 1b-2b) (emphasis added).

Based on the trial court's ruling, the total offense variable score was one-hundred points.

THE COURT: Okay. Now I'll add this up. I get a hundred.

MS. LINDSAY: Okay, yes.

THE COURT: Are you both in agreement that the offense variables total up to one hundred?

MR. DALY: Based on your ruling, Judge.

THE COURT: All right. That's what we're going by, my ruling. Okay. Proceed. (Appellee's Appendix, 5b).

The trial court's scoring of the guidelines increased the offense level from II to III, by one (1) point. At offense level II, Defendant Kimble's guidelines were 180-300 or life. By increasing OV 16 from one (1) to five (5) points totaling one hundred (100) points, Defendant Kimble fell within offense level III. In offense level III, the guideline range increased to 225-375 or life.

MR. DALY: He was a C. Judge that would, according to the grid, change his guideline by one point.

MS. LINDSAY: That's correct.

MR. DALY: To 225 to 375 months.

MS. LINDSAY: That is correct. (Appellee's Appendix, 6b).

The sentencing judge imposed a sentence of thirty (30) to seventy (70) years, at the very top of the adjusted guideline range in offense level III, and five (5) years beyond the sentencing guideline range that the Defendant advocated was correct.

On his appeal as of right, Defendant-Appellee challenged the trial court's scoring of the guidelines stating: "Defendant Kimble was denied due process of law at his sentencing when: "(A) his sentence was based on inaccurate scoring of the guidelines." The State responded:

> The scoring of offense variables is reviewed for clear error, or forfeited error if defendant failed to object. OV 9 and 10 were properly scored, and OV 16 forfeited where defendant victimized three people with predatory conduct in following the victim's car and shooting her during the course of a carjacking. The trial court did not commit clear error in assessing these points. . . . (emphasis added).

On appeal to the Court of Appeals, the State argued that the claim before this Court was forfeited, not waived. The Court of Appeals did not address a waiver argument.

In the delayed application for leave to appeal, the State again argued forfeiture and did not raise a waiver claim.

> MCL 769.34(10) precludes sentencing relief for forfeited claims of error in scoring the sentence guidelines, and forfeited error review

requires defendant establish plain error affected his substantial rights. Defendant here forfeited consideration of his sentencing claim by failing to properly raise the issue below. Is defendant entitled to relief where he preyed upon three people by following the victim's car and then shooting her during a carjacking? (Emphasis added).

SUMMARY OF ARGUMENT

Under the newly established legislative sentencing guidelines, it is the responsibility of the sentencing judge to accurately determine the appropriate sentencing guideline range. A sentencing judge must impose a sentence within the appropriate guideline range, or state substantial and compelling reasons for a departure. By law, OV 16 does not apply to homicide convictions. However, the prosecutor in this case advocated for a score of five (5) points on this variable after the Probation Department had scored it one (1) point. Defense counsel argued that Probation Department was correct, but the sentencing judge agreed with the prosecution. The scoring of five (5) points on OV 16 increased the maximum guideline range by five (5) years and the sentence imposed was five (5) years beyond the correct guideline range. The sentencing judge provided no reasons for the departure. Therefore, the sentence imposed was invalid as a matter of law.

The Court of Appeals correctly granted resentencing under the plain error standard given that the sentence was clearly unlawful and the sentence imposed outside the appropriate guideline range prejudiced Defendant Kimble. The preservation requirement of MCL 769.34(10) does not apply to a sentence

outside the appropriate guideline range. If it did, then the appellate courts are free to apply the plain error standard as the preservation requirement is procedural and the legislature cannot usurp the Court's exclusive constitutional power to determine matters of procedure and practice.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN APPLYING THE PLAIN ERROR DOCTRINE BECAUSE IT IS UNDISPUTED THAT THE SENTENCE WAS OUTSIDE THE APPROPRIATE GUIDELINE RANGE DUE TO AN ERRONEOUS SCORING OF THE GUIDELINES BY THE TRIAL COURT, RENDERING THE SENTENCE UNLAWFUL.

STANDARD OF REVIEW: Whether the Court of Appeals abused its discretion in applying the plain error doctrine to an uncontroverted erroneous scoring of the statutory guidelines that resulted in a sentence five (5) years beyond the minimum sentence of the appropriate guideline range. People v Carines, 460 Mich 750 (1999).

It is undisputed that the sentence imposed is outside the appropriate guideline sentence range. It is equally undisputed that the sentence imposed is five (5) years beyond the correct minimum sentence guideline range and the sentencing judge did not give any reasons for the departure. At sentencing, the prosecutor advocated an erroneous score for offense variable sixteen (16), that resulted in the incorrect guideline range. Defense counsel objected, but not on the grounds that the guidelines explicitly excluded any score on that offense variable. The trial court failed to recognize that the clear language of the

guidelines which precluded the assessment of any points for offense variable sixteen (16) for a homicide conviction. Consequently, the trial judge imposed an unlawful sentence outside the mandatory sentence guidelines. The Court of Appeals found that the trial court's erroneous application of the offense variable constitutes plain error, affecting the substantial rights of the Defendant and remanded for resentencing. Having concluded that the trial court "misapprehended and misapplied the law," and that the "Defendant's rights were clearly prejudiced" by a sentence five (5) years beyond the guideline range, the Court of Appeals ordered resentencing because it was "a sentence which the legislature did not authorize." The plain error doctrine was appropriately applied and the Court of Appeals did not abuse its discretion.

This Court granted the State's delayed application for leave to appeal and instructed the parties to include among the issues to be briefed, the following:

(1) Whether the preservation requirement of MCL 769.34(10) applies to the claim relating to offense variable 16;
(2) If applicable , would the statute preclude an appellate court from considering the claim of error even under a plain error standard; and
(3) If so, whether such provision is within the power of the Legislature. McDougall v Schanz, 461 Mich 15 (1999).

A. THE ERRONEOUS APPLICATION OF THE GUIDELINES.

Because the offense occurred after January 1, 1999, the legislative sentencing guidelines apply. People v Hegwood, 465 Mich 432 (2001). MCL 777.21 places the obligation on the trial court to "score only those offense variables" that apply to the case. MCL 777.21(1) directs that offense variable sixteen (16) does not apply to crimes against persons unless the conviction is for home invasion. Thus, Defendant's second degree murder conviction is explicitly excluded and the offense variable does not apply.

The Court of Appeals correctly found:

> As noted, MCL 777.21 directs the trial court to "score only those offense variables" that apply. Offense variable 16 does not apply here because second-degree murder is in the "crimes against a person" category, MCL 777.16p, and, under §22, for crimes against a person, OV 16 applies only to the home invasion statute. MCL 777.22(1). 252 Mich App at 276. (Appellee's Appendix, 15b).

The State, in their Brief on Appeal, acknowledges this:

> Here, OV 16 clearly did not apply to this defendant and the offense he committed, and for that reason, there is sentencing error (Brief, p. 15) (emphasis added).

There is no dispute on this. Yet, everyone in the sentencing procedure and hearing misapplied the law regarding this offense variable.

The Probation Department in the Sentencing Information Report scored offense variable sixteen (16) one (1) point (Appellee's Appendix, 1b). The

prosecutor advocated that the correct score was five (5) points based on the value of the property taken. The defense attorney objected to the prosecutor's position, but agreed with the Probation Department's assessment regarding the value of the property and the one (1) point score (Appellee's Appendix, 1b-2b). The trial judge adopted the clearly erroneous position advocated by the prosecutor (Appellee's Appendix, 2b).

The Court of Appeals correctly found:

> Though the legislative guidelines are clear, the record indicates that the prosecutor, defense counsel, and the trial court all failed to recognize that OV 16 does not apply to this offense. (Appellee's Appendix, 15b).

The misapplication of the law by the sentencing court resulted in a sentencing guideline range that was clearly wrong and a five (5) year increase in the sentence. The State does not dispute this either. Instead, they argue that the sentence is now lawful because the claim has been forfeited and appellate court abused its discretion in applying the plain error doctrine.

B. THE PRESERVATION REQUIREMENT OF MCL 769.34(10) DOES NOT APPLY WHEN THE SENTENCE IMPOSED IS OUTSIDE THE APPROPRIATE GUIDELINE RANGE AND THE COURT FAILS TO STATE ANY SUBSTANTIAL AND COMPELLING REASONS FOR THE DEPARTURE.

MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

The Court of Appeals correctly interpreted the language of the statute to allow the appellate courts to address unpreserved challenges to the scoring "if the sentence is <u>not</u> within the appropriate guideline range."

> However, we read the statute to allow an unpreserved appellate challenge to the scoring if the sentence is not within the appropriate guidelines range. This latter reading is bolstered by the first sentence, which contemplates appellate review of scoring challenges if the minimum sentence is not within the appropriate range. Indeed, this reading is most logical given the Legislature's repeated indication that appellate review is based on whether the sentence is "within the appropriate guidelines sentence range . . ." Moreover, under the dissent's interpretation, if a sentence is not within the appropriate guidelines range, a party could raise an unpreserved issue relating to inaccurate information, but could not raise an unpreserved claim relating to scoring. We see no basis for reading the statute to treat the two challenges differently. Either error, misscoring or relying on inaccurate information, could result in a sentence that is not within the appropriate guidelines range. (Appellee's Appendix, 15b-16b, fn 5).

This common sense interpretation of the plain language of the statute effectuates the legislative intent in the following respects. First, the statutory scheme requires the court to determine what the appropriate sentence range is. MCL 777.21. Secondly, the statute requires a sentence "shall be within the appropriate sentence range," unless there are substantial and compelling reasons for a departure. MCL 769.34(2) and (3). Thus, a sentence, as here, that is not within the appropriate sentence range and the trial court has not recognized or articulate any substantial or compelling reasons for a departure, is illegal. Under the legislative guidelines, a sentence is valid only if it is either within the appropriate guideline range or the court states substantial and compelling reasons for the departure. As such, the sentence here must be vacated and sent back to the trial court for resentencing because it is invalid, regardless of any challenge by the Defendant.[1]

If a sentence is imposed within the appropriate or correct guideline range, then a challenge to the scoring of the guidelines or inaccurate information "relied

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[1]As a practical matter, this is required. Whenever, as here, a "misscoring" or violation of the statutory provision results in a sentence imposed outside the appropriate or correct guideline, the trial court will not articulate any reasons for a departure because he/she will not recognize it as a departure, clearly violating the statutory requirements.

upon in determining a sentence that is within the appropriate guideline range," must be raised at sentencing or in a subsequent motion in the trial court or Court of Appeals. MCL 769.34(10).[2]

In other words, a sentence within the appropriate guideline range is presumptively valid and any challenge to the scoring of the guidelines is forfeited unless preserved by objection or motion. A sentence outside the appropriate guideline range is presumptively invalid and the sentencing judge is required to directly inform the defendant that he may have grounds for appeal, MCL 769.34.[3] There is no preservation/objection requirement for a sentence outside the appropriate guideline range.

In short, once it is determined that the sentence imposed is not within the appropriate guideline range and the trial court has failed to articulate substantial

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[2]This interpretation is consistent with the language of MCL 769.34(10) which allows a challenge of a sentence within the appropriate guideline range if there is "an error in scoring the sentencing guidelines or inaccurate information."

[3](7) If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.

and compelling reasons for a departure outside the appropriate range, it is an invalid sentence that must be vacated.[4] The legislative preservation requirement does not apply. However, the state may still raise a judicially created procedural forfeiture claim.

C. WAIVER AND FORFEITURE.

This Court has distinguished between the a waiver and forfeiture and what effect it has on appellate review.

> In evaluating this matter, we examine principles outlined in People v Carter, 462 Mich 206, 214, 215, 612 NW2d 144 (2000):
>
> > The rule that issues for appeal must be preserved in the record by notation of objection is a sound one. People v Carines, 460 Mich 750, 762-765; 597 NW2d 159 (1999). Counsel may not harbor error as an appellate parachute. People v Pollick, 448 Mich 376, 387; 531 NW2d 159 (1995); quoting People v Hardin, 421 Mich 296, 322-323; 365 NW2d 101 (1984). "Deviation from a legal rule is "error" unless the rule has been waived." United States v Olano, 507 US 725, 732-733; 113 S Ct 1770, 123 L Ed 2d 508 (1993).
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> > * * *
>
> > Waiver has been defined as "the intentional relinquishment or abandonment of a known right." Carines,

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[4]It has long been recognized by this Court, that an invalid sentence must be set aside. People v Mitchell, 454 Mich 145, 176 (1997); People v Miles, 454 Mich 90, 96 (1997); In Re Jenkins, 438 Mich 364, 373 (1991); People v Whalen, 412 Mich 166, 169-170 (1981). See also MCR 6.429(A).

> supra at 762[-763], n 7, quoting Olano, supra at 733. It differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." *Id.* "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." United States v Griffin, 84 F3d 912, 924 (CA 7, 1996), citing Olano, supra at 733-734. Mere forfeiture, on the other hand, does not extinguish an "error." Olano, supra at 733; Griffin, supra at 924-926.

The distinction between forfeiture and waiver is essential to a sound resolution of the present case. Forfeited error remains subject to appellate review in limited circumstances. Carines, 460 Mich 774. However, apparent error that has been waived is "extinguished." Carter, 462 Mich 215-216. When a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal. As we said more succinctly in Carter:

> Because defendant waived, as opposed to forfeited, his rights under the rule, there is no "error" to review. [462 Mich 219]. People v Riley, 465 Mich 442, 448-449 (2001).

Thus, whereas forfeiture is the failure to make a timely objection, waiver is the "intentional relinquishment" or abandonment of a known right." United States v Alamo, *id*; Scott v Collins, 286 F3d 923 (6th Cir, 2002). For the first time, the State now claims that the sentencing issue here is waived, rather than forfeited, assuming the application of section ten (10) of MCL 769.34. In the

Court of Appeals and their delayed application to this Court, the State argued that the claim was forfeited, not waived.

At the outset, the State's failure to previously raise the waiver claim in the Court of Appeals or the application to this Court itself, constitutes a waiver. Clearly, the failure to raise this claim waives it for review by this Court. People v Albert Smith, 439 Mich 954 (1992) ("a party who seeks to raise on appeal but who fails to brief it may properly be considered to have abandoned the issue."); People v Miller, 238 Mich App 168, 172 (1999) ("We will not consider this argument. Defendant did not raise his constitutional challenge in the list of questions presented. Further, nothing in Defendant's statement of questions presented suggest that he is presenting a constitutional challenge."); People v Brown, 239 Mich App 735, 748 (2000) ("[D]efendant did not preserve this argument for appeal because she did not raise it in her statement of the issues presented."); People v Mackie, 241 Mich App 583, 604 fn 4 (2000); People v Yarbrough, 183 Mich App 163, 165 (1990). Since the State did not raise this claim before the Court of Appeals and leave by this Court was not granted on this claim, the State waived or abandoned it.

Moreover, the record establishes that counsel did not express satisfaction with or approve of the trial court's scoring of offense variable 16.[5] The dispute regarding the scoring of OV 16 began with the trial prosecutor's argument that the correct score was five (5) points, not one (1) as the Probation Department had scored on the sentencing information report. Defense counsel argued that the Probation Department was correct. The trial judge disagreed with defense counsel and scored OV 16 five (5) points. Defense counsel did not approve of the trial court's ruling. In fact, had the trial court agreed with defense counsel, the appropriate and correct guideline range would have been 180 to 300 months, since it was the additional four (4) points that increased Defendants offense level from II to III. Thus, the State's claim that the "defendant who expresses satisfaction that the sentence guidelines are scored correctly cannot later assert a scoring error" simply does not apply to this case.

Finally, a waiver can exist only as "the intentional relinquishment or abandonment of a known right." United States v Olano, 507 US 725, 733, 113

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[5]In contrast, this Court in Riley, supra, found that the defense affirmatively waived a confrontation claim by calling a defense witness and eliciting testimony that was inadmissible hearsay from an accomplice and incriminating against the defendant.

S Ct 1170, 123 L Ed 2d 508 (1993); People v Carter, 462 Mich 206, 215 (2000); People v Carines, 460 Mich 750, 762, n 7 (1999) (emphasis added). Obviously, had any participant to the proceedings known that OV 16 did not apply, it would not have been considered. In United States v Herndon, 156 F3d 629, 634 (6th Cir, 1998), the Sixth Circuit held that the plain error standard applies when "the trial judge and prosecutor were derelict in countenancing the error." Certainly, had defense counsel known that OV 16 was inapplicable by law, it would have been brought to the court's attention.

In short, if section ten (10) of MCL 769.34 were applicable, an appellate court could still consider the claim of error under the plain error standard.

D. APPLICATION OF THE PLAIN ERROR DOCTRINE.

Assuming the application of the forfeiture provisions of subsection 10, "[m]ere forfeiture . . . does not extinguish an 'error.'" People v Carter, 462 Mich 206 (2000). Notwithstanding any arguments regarding interpretation of the statute, the Court of Appeals did not abuse its discretion in applying the plain error doctrine.

> [A]n appellate court properly may review forfeited claims of error when the forfeited claim involves a plain error affecting the defen-

dant's substantial rights." People v Grant, 445 Mich 535, 547-549 (1994).

An abuse of discretion has been defined as follows:

> Where . . . the exercise of discretion turns upon a factual determination made by the trier of fact, an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. Spalding v Spalding, 355 Mich 382, 384-385 (1959) (emphasis added).

In People v Charles O. Williams, 386 Mich 565, 573 (1972), this Court recognized that a somewhat stricter standard must be observed in criminal cases.

In People v Carines, 460 Mich 750, 734 (1999), this Court defined the plain error doctrine, relative to forfeiture:

> To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e. clear or obvious, (3) and the plain error affected substantial rights. [*United States v Olano*, 507 US 725, 731; 113 S Ct 1770; 123 L Ed 2d 508 (1993).] The third requirement generally requires a showing of prejudice, i.e. that the error affected the outcome of the lower court proceedings.

The first two (2) requirements are not in dispute. The trial court erred and error is clear and obvious since the guidelines are explicit in stating that offense

variable sixteen (16) does not apply to homicides. A sentence five (5) years beyond that authorized by law establishes prejudice.

In Glover v United States, 531 US 198, 121 S Ct 696, 148 L Ed 2d 604 (2001), the United States Supreme Court addressed the issue of prejudice in the context of ineffective assistance of counsel, for the failure of counsel to object to the prosecutor's erroneous claim that resulted in an erroneous guideline sentencing range. The Court, finding that the defendant had been sentenced under the wrong guideline range, concluded that the increase from six (6) to twenty-one (21) months in prison constituted prejudice under Strickland v United States, 466 US 668, 109 S Ct 2052, 80 L Ed 2d 674 (1984). Rejecting the Seventh Circuit's holding that the sentence increase did not meet the prejudice requirement, the Court concluded:

> Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance. Glover, supra, 531 US at 203.

Although this claim is not an ineffective assistance of counsel issue, there is simply no basis to distinguish prejudice under the Strickland standard and plain error doctrine, since both require that the error affects the outcome of the lower court proceedings.

Alternatively, defendants would be compelled to seek relief under a claim of ineffective assistance of counsel, with the same compelling result of resentencing because the error is so obvious and prejudicial.[6]

Finally, it should be noted that the Court of Appeals remanded for the sentencing judge to correct the sentence guideline range. Whether the sentence remains the same, or a departure is warranted for substantial and compelling reasons, is for the sentencing judge to initially decide.

E. THE PRESERVATION REQUIREMENT OF MCL 769.34(10) CANNOT SUPERCEDE THE COURT'S JUDICIARY CREATED PLAIN ERROR TEST BECAUSE OF THE SEPARATION OF POWERS GRANTING CONSTITUTIONAL AUTHORITY TO THE COURT TO REGULATE PRACTICE AND PROCEDURE.

If section 10 is applied to an invalid sentence imposed outside the appropriate sentencing guideline range, and was construed to be a waiver on appeal, it is unconstitutional.[7] Rules of practice and procedure, which include the

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[6]People v Wilson, 252 Mich App 390, 393-397 (2002); People v Harmon, 248 Mich App 522 (2001).

[7]This Court could construe section 10 to be a forfeiture rather than waiver provision, thus making it consistent with the judiciary created plain error standard.

obligation to object and raise the claim initially in the trial court, rest exclusively within this court's authority. The judicially created plain error standard would prevail over the statutory provision. The legislature lacks the constitutional authority to deprive the Courts from applying the plain error standard, as the Court of Appeals did in the present case.

In McDougall v Schanz, 461 Mich 15 (1999), this Court, once again, recognized the court's exclusive authority to determine rules of practice and procedure under the Michigan Constitution, 1963, Art. 6, §15.[8] The Court further recognized that this constitutional power is grounded in the principles of separation of powers. Const. 1963, Art. 3, §2; Perin v Peuler (On Rehearing), 373 Mich 531 (1964). In determining the constitutionally of a statutory provision, the Court must decide whether the statute addresses procedural matters or substantive law. 461 Mich at 27. A statutory provision violates the Const. 1963, Art. 6, §5, when the rule is "designed to allow the adjudicatory process to function effectively," "involv[es] the orderly dispatch of judicial business" rather than "a legislatively declared principle of public policy," *id* at 30-31.

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[8]The Constitution provides: The Supreme Court shall by general rules establish, modify, amend, simplify the practice and procedure in all counts in this state.

The failure to object is a judicially created rule of procedure itself. This Court has consistently recognized that the preservation requirement is designed "encourage litigants to seek a fair and accurate trial the first time around . . ." which enhances the orderly dispatch of judicial business. People v Carines, supra at 761; People v Grant, 445 Mich 551 (1994).

> [R]equiring a contemporaneous objection provides the trial court "an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be far the best time to address a defendant's constitutional and non-constitutional rights. People v Carines, supra, at764-765, citing to People v Gant, supra, at 551.

Specifically, this Court cited to United States Supreme Court precedent regarding the state's "right to develop procedural rules that lead to issue forfeiture," when a party fails to object.

> Indeed, the United States Supreme Court has recognized a state's right to develop procedural rules that lead to issue forfeiture even where the procedural rules implicate constitutional protections if the rules serve a legitimate state interest. Grant, supra at 546-547.[9]

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[9]The Court noted the distinction between waiver and forfeiture, as set forth in United States v Olano, 507 US 725, 733, 113 S Ct 1770, 123 L Ed 2d 508 (1993).

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right."

In United States v Olano, supra, the Court unequivocally recognized the failure to timely object as a procedural principle.

> No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. Yakus v United States, 321 US 414, 444, 64 S Ct 660, 677, 88 L Ed 834 (1944). 507 US at 731.

The Court added:

> Although "[a] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice," Hormel v Helvering, 312 US 552, 557, 61 S Ct 719, 721, 85 L Ed 1037 (1941), the authority created by Rule 52(b) is circumscribed. 507 US at 732.

The Legislature has recognized the authority of the courts to correct unpreserved errors in procedure.

> This Court can and should correct unpreserved error in pleadings and procedure when it has caused a miscarriage of justice. MCL 769.26, MSA 28.1096. People v Carter, 462 Mich 206, 222-223 (2000) (Kelly, J. dissenting) citing to People v Dorrikas, 354 Mich 303, 316 (1958).

As the Court in Olano stated:

> [I]n criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice [forfeited error]. 507 US at 734.

In summary, the discretion vested in the appellate courts to correct an unpreserved error is grounded in the Court's constitutional powers and cannot be usurped by the Legislature. If this Court construes section 10 to be a waiver provision precluding absolutely the right of the courts to grant relief to an unpreserved sentencing error, then the section is unconstitutional.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellee requests this Honorable Court affirm the Court of Appeals opinion in this case.

Respectfully submitted,

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Dated: December 17, 2003